

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DARRYL BRECKENRIDGE,

Plaintiff,

vs.

Hon. Thomas Ludington
Case No. 12-11677

NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA.,
a foreign corporation,

Defendants.

**PLAINTIFF'S MOTION/STATEMENT THAT *DE NOVO* IS THE CORRECT STANDARD OF
JUDICIAL REVIEW**

Plaintiff, DARRYL BRECKENRIDGE, through his attorneys, ILANA S. WILENKIN and FELDHEIM & WILENKIN, P.C., and pursuant to this Court's June 27, 2012 Scheduling Order, submits the following statement in support of his argument that *de novo* is the correct standard of judicial review that should be applied when reviewing the above-captioned cause:

1) Effective June 1, 2007, the Michigan Office of Financial and Insurance Services ("OFIS") banned the use of discretionary clauses in, *inter alia*, disability policies. Specifically, the OFIS has directed that:

R 500.2202 Discretionary Clauses Prohibited.

Rule 2. (a) A discretionary clause unreasonably reduces the risk purported to be assumed in the general coverage of the policy within the meaning of MCL 500.2236(5).

(b) On and after the first day of the first month following the effective date of these rules, an insurer shall not issue, advertise, or deliver to any person in this state a policy, contract, rider, indorsement, certificate, or similar contract document that contains a discretionary

clause. This does not apply to a contract document in use before that date, **but does apply to any such document revised in any respect on or after that date.**

(c) On and after the first day of the first month following the effective date of these rules, a discretionary clause issued or delivered to any person in this state in a policy, contract, rider, indorsement, certificate, or similar contract document is void and of no effect. This does not apply to contract documents in use before that date, **but does apply to any such document revised in any respect on or after that date.**

(Emphasis added).

2) The regulation does not limit the scope of its prohibition to particular sections of a Plan but, instead, proscribes the presence of discretionary clauses - thus obviating the arbitrary and capricious standard of review - in any policy, contract, rider, indorsement, certificate, or similar contract that is **revised in any aspect after June 1, 2007.**

3) The Dow Chemical Company's Voluntary Group Insurance Policy and Summary Plan Description ("Plan") is an ERISA-governed Plan.

4) The Plan clearly indicates that it was "*Amended and Restated: October 19, 2009 Effective January 1, 2010 and thereafter until superseded.*" (Ex. 1, Plan's cover sheet submitted for Judge Ludington's copy; entire Plan electronically submitted as complete Exhibit).

5) *Am. Council of Life Insurers vs. Ross*, 558 F.3d 600, 609 (6th Cir. Mich. 2009) determined that the "Michigan rules fall within the ambit of ERISA's savings clause and are not preempted by that statute."

6) Plaintiff maintains that because the Plan was amended and restated as of October 19, 2009, effective January 1, 2010, R 500.2202 directs that *de novo* is the appropriate standard of review.

7) Plaintiff respectfully requests that this Court utilize a *de novo* standard when reviewing the parties' cross-motions requesting judgment on the administrative record.

WHEREFORE, based upon the preceding, Plaintiff proffers that *de novo* is the appropriate standard of review and respectfully requests that this Court employ the same when reviewing the parties' respective cross-motions.

Respectfully submitted:

FELDHEIM & WILENKIN, P.C.

By: s/ Ilana S. Wilenkin (P61710)
Plaintiff's Attorney
30300 Northwestern Highway, Suite 108
Farmington Hills, MI 48334-3255
(248) 932-3505; Fax (248) 932-1734

CERTIFICATE OF SERVICE

On July 13, 2012, I certify that a copy of the foregoing document was served on all attorneys of record via the ECF system. I declare that the statements are true and accurate to the best of my knowledge and belief.

s/ Ilana S. Wilenkin
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**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION/STATEMENT THAT *DE NOVO* IS THE
CORRECT STANDARD OF JUDICIAL REVIEW**

Plaintiff relies upon the facts, regulations, and case law referenced in his accompanying motion.

Respectfully submitted:

FELDHEIM & WILENKIN, P.C.

By: s/ Ilana S. Wilenkin (P61710)
Plaintiff's Attorney
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s/ Ilana S. Wilenkin
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